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April 18, 2023

VIA ECF

Honorable Kevin McNulty
United States District Judge
Lautenberg U.S. Post Office & Courthouse
Federal Square
Newark, New Jersey 07102

Re: *United States* v. *Coburn & Schwartz*
Criminal No. 19-120 (KM)

Dear Judge McNulty:

We are in receipt of the government's letter dated April 17, 2023 regarding the scope of tomorrow's hearing. For the reasons discussed below, we disagree with the government's characterizations of both what is at issue at the hearing and the proof that is relevant to those issues.

First, even though the Court has limited the timeframe of the *Garrity* portion of the hearing to April 2016 through October 24, 2016, as the Court previously recognized during the December 2, 2022 oral argument, interactions that occurred after this time period may speak directly to the prescribed time period to the extent they address the underlying

allegations that were the focus of Cognizant's investigation or events that took place in the prescribed time period. So, for example, DLA Piper's March 9, 2018 draft agenda for Cognizant's Filip Factors presentation to the government on March 10, 2018, while itself dating from outside the prescribed time period, contains material that is within the prescribed time period, including that counsel for Cognizant "[d]oggedly persist[ed] in securing additional interviews with both the President [Gordon Coburn] and the General Counsel [Steven Schwartz]" prior to their resignations. CTS_R17_00005299 at 5306. The Court made this point clear during the December 2, 2022 oral argument when it corrected the government's assertion that "evidence of something that happened years and months later [after October 24, 2016] is not evidentiary relevant to the question of [w]hat happened three weeks after the first disclosure," responding, "Well, it can be. . . . It's not the date of it. It is what it signifies." Dec. 2, 2022 Tr. at 90:10–17.

Moreover, this understanding of the hearing's scope poses no prejudice to the government or to the witnesses appearing at the hearing. The government's February 24, 2023 production of pre-hearing documents—produced for the purposes of witness preparation—included materials spanning the period of September 1, 2016 to February 14, 2019. Thus, as evidenced by the scope of the discovery produced by the government of these witnesses' documents and communications, the government and these witnesses are prepared to address communications outside the April 2016 through October 24, 2016 time period to the extent that they bear on the charged conduct or prescribed time period. On the other hand, the Defendants stand to be severely prejudiced should the Court adopt the government's interpretation and limit the hearing the way the government proposes. Indeed, the Defendants selected their four witnesses in reliance on the understanding of the scope of the *Garrity* portion of the hearing described by the Court.

Second, the government's letter asserts that the hearing concerns only whether Cognizant's interviews of the Defendants were "government-engineered." ECF No. 469 at 1. However, the legal standard is whether the company's conduct is "fairly attributable to the Government." *United States* v. *Stein*, 541 F.3d 130, 146–51 (2d Cir. 2008); *see also* (ECF No. 96 at 11) ("Where, as here, a private employer conducted the interview, there is another step to the analysis; under the Second Circuit's approach, statements obtained in a coerced interview may be suppressed only if the interview is 'fairly attributable' to the government.") (quoting *United States* v. *Connolly*, 2019 WL 2120523, *10–11 (S.D.N.Y. May 2, 2019)). The case law indicates that private action may be fairly attributable to the government in circumstances that do not involve government engineering. *Stein*, 541 F.3d at 147 (A "sufficiently close nexus" exists between action of a private employer and the government when the government "provides the private actor with *significant encouragement,* either overt or covert, or when the private actor operates as a *willful participant in joint activity* with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is *entwined with governmental policies*.") (emphasis in original).

Third, the government's letter entirely ignores that, as the Court made clear, the hearing concerns *Brady*, as well as *Garrity*, claims. *See* Jan. 10, 2022 Tr. at 9:20–23 (granting defense's requested hearing "for the motions having to do with the interviews of

the defendants and also the one having to do with whether the corporation is inside the *Brady* circle"); Jan. 31, 2022 Tr. at 8:6–8 (addressing "the hearing on the *Garrity* and the companion motion"). The Court's order of April 17, of course, addresses only "the substantive scope of the *Garrity* hearing," ECF No. 468 at 7 n.4, and does not implicate the scope of questioning relevant to Defendants' *Brady* claims, which the government has conceded reach a time period extending well beyond Coburn's and Schwartz's interviews in August and September of 2016. *See* Dec. 2, 2022 Tr. at 99:2–7 (THE COURT: "The first part of the argument, the *Garrity* part, obviously, you were focusing on that September period when the interviews took place. But how about the *Brady* piece? Does that depend more on the control or relationship over the years? MS. PATEL: Certainly that information would be relevant to the *Brady* piece, and I'm not arguing that it's not.").

We will be prepared to discuss these issues, including as part of our opening statements, in open court tomorrow.

Respectfully submitted,

/s/ Roberto Finzi

Roberto Finzi

cc: All Counsel (by ECF)